No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1954

DORSEY K. OFFUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 264-267) in the instant case is reported at 208 F. 2d 842. The certificate of contempt (R. 25-29) filed by the trial court is reported in substantial part at 208 F. 2d 842-843. The opinion of the Court of Appeals (R. 269-290) in the related appeal of petitioner's client, Henry L. Peckham, Jr., is reported at 210 F. 2d 693.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 268), and a petition for rehearing was denied on December 14,

1953 (R. 303-304). On January 13, 1954, the time for filing a petition for a writ of certiorari was extended by order of Mr. Chief Justice Warren (R. 307) to and including February 12, 1954, on which date the petition was filed. Certiorari was granted on April 5, 1954 (R. 308). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's conduct, involving repeated incidents of various kinds, was properly found to be contempt of court.

2. Whether the District Judge was disqualified from exercising his power summarily to adjudge petitioner in contempt, by reason of his manner of reproving petitioner for improper conduct and his methods of seeking compliance with his rulings, when petitioner disobeyed them.

STATUTE AND RULE INVOLVED

Title 18, U.S.C. § 401, provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its law-

ful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure, provides:

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is dis-

qualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, petitioner was found guilty of a series of contempts of court committed during the course of the fourteen-day trial in *United States* v. *Henry L. Peckham, Jr.*, in the United States District Court for the District of Columbia, before Judge Holtzoff. The Court of Appeals (per Edgerton, Bazelon, and Fahy, J. J.) held that "The record amply supports" a number of the trial judge's specific findings of improper conduct and his "ultimate finding of contempt" (R. 266) and affirmed petitioner's conviction, after reducing his sentence from ten days to forty-eight hours (R. 268).

A. *District Court Proceedings*

Petitioner was trial counsel for defendant Peckham, who was charged on a two-count indictment with having performed abortions on one Mary M. Ott in May 1951 and January 1952. After a trial by jury, which began on May 27, 1952, and was completed on June 16, 1952, Peckham was convicted on one count and acquitted on the other (R. 4-7).

On June 16, 1952, immediately after the jury retired to deliberate upon its verdict, the trial judge, after observing that petitioner had failed during

the trial to heed any of the court's "many warnings or admonitions" concerning his conduct, summarily adjudged him guilty of contempt of court and sentenced him "to be committed to the custody of the United States Marshal for the District of Columbia for a period of ten days", but with directions that, upon the return of the jury, petitioner be made available to represent the defendant (R. 256-257, 258). The trial judge also called petitioner's conduct to the attention of the Bar Committee on Admissions and Grievances (R. 257).

The certificate (R. 25-29), which was filed in conformity to Rule 42(a) of the Federal Rules of Criminal Procedure, contains a finding that petitioner was guilty of contempt for "breaches of decorum and offensive, contumacious, and unethical conduct in open court" as seen and heard by the trial judge, and an enumeration of twelve categories of misconduct, supported by a number of references to specific incidents shown in the trial record. This certificate incorporated by reference the entire transcript of proceedings at the *Peckham* trial and stated that the particular instances cited were "illustrative and not exhaustive" (R. 26).[1]

The trial was punctuated by numberless incidents on the part of petitioner, which led to his being con-

[1] The record before this Court is made up of a printed joint appendix and the complete typewritten *Peckham* trial transcript, which together constituted the record in the Court of Appeals. References to pages in the printed joint appendix are indicated by (R.) and those in the trial transcript by (Tr.). Record excerpts included in the appendix to this brief are indicated by (Gov. App.).

tinually admonished and reproved by the court—(e.g. R. 55, 56, 59, 60-62, 68, 69, 70, 72, 127, 130-131, 135, 137, 139-140, 148, 152, 153, 158, 162, 174, 179-180, 182, 190, 197, 199, 211, 216-217, 223, 225, 226, 231, 232, 238, 245, 250-252). Petitioner was given repeated warnings that his conduct was regarded as contemptuous and that he was inviting punishment for contempt (R. 81, 88, 142, 180). The details of a few typical incidents are set forth, *infra*, on pp. 12-24, and in Appendix B to this brief (Gov. App. pp. 74-82, *infra*).

B. *Court of Appeals Proceedings*

On appeal, the Court of Appeals for the District of Columbia Circuit found that the evidence "amply supports" four (see pp. 9-10, *infra*) of the twelve categories of misconduct found by the trial judge as well as his "ultimate finding of contempt" (R. 266).[2] But it also found that "the record does

[2] Petitioner's brief incorrectly states (Br. 14) that eight of the twelve sets of contempt findings were reversed by the Court of Appeals. That court did not pass on six of the categories of findings, three of which specified many incidents of misconduct involving frequent boisterousness, belligerence and the use of an offensive tone of voice in addressing the court, matters which necessarily could not be shown by the toneless printed words appearing in the record. However, the court noted that these three sets of specific findings were rendered credible by "Finding 1" (p. 9, *infra*), regarding petitioner's "gross discourtesy" and his "insulting and offensive remarks to the court", which finding "the record amply supports" (R. 265-266). Only two of the twelve numbered findings were actually set aside (R. 266), one of these because it involved acts not committed in open court.

not support the penalty imposed" in that (R. 266-267):

> Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other. The judge's treatment of appellant, examples of which are included in an appendix [R. 285-290] to our opinion in *Peckham* v. *United States* [R. 269-290], decided today, and which is the chief factor in leading a majority of this court to conclude that Peckham's conviction cannot stand, leads us all to conclude that appellant's sentence should be reduced from 10 days to 48 hours.

In the *Peckham* case, the majority, in reversing Peckham's conviction by a 2-1 vote, held "that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating at times hostility, though under provocation, demonstrated a bias and lack of impartiality which may well have influenced the jury;[3] that, considering these matters and others,[4] examples of which are set forth in an Ap-

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[3] This view was based, at least in part, upon the trial court's failure to take the "minimal precautions", even though not requested by the defense, of admonishing the jury, either at the time of the occurrence of the incidents or in the charge to the jury, that the "numerous clashes between defense counsel, on the one hand, and the court and prosecutor, on the other" were not to be taken against Peckham (R. 281-282, fn. 14).

[4] Including certain alleged errors, unrelated to the clashes between the trial judge and petitioner, which the court below stated "would not, standing alone, amount to prejudicial error" (R. 282, fn. 15).

pendix [R. 285-290] attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial" (R. 281-282).[5] In conclusion, the court below in the *Peckham* case stated (R. 283-284):

> The majority believes that, in the light of the disorderly atmosphere at the trial, it would require too great a degree of speculation to say that the appellant was fairly tried on the issues relevant to the first count. We are all agreed that the misconduct of appellant's counsel which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant.

In referring to its affirmance of petitioner's conviction for contempt of court, the court below stated in the *Peckham* opinion that, "By sustaining the conviction we have expressed our conclusion that counsel was contemptuous, while in reducing the sentence we have reflected our view that his conduct was not altogether separable from that of the judge in treading the area reserved for counsel, thus creating conflict and engendering remarks and attitudes on the part of both court and counsel which afflicted the trial" (R. 282).

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[5] Judge Fahy dissented, believing that the jury had in fact given impartial consideration to the evidence, uninfluenced by any of the incidents which took place during the trial (R. 282-283).

C. Details Respecting Petitioner's Contempt.

The specifications contained in the certificate of contempt, insofar as they were affirmatively sustained by the court below, are as follows (R. 26-29):

> 1. On numerous occasions, he made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy to the court.
>
> June 4, 1952, pp. 13, 16-17, 291, 297 [R. 79, 81-82, 113, 115].
>
> June 5, 1952, pp. 45, 138, 194 [R. 133, 146, 155].
>
> June 6, 1952, pp. 235-236, 255-256 [R. 157-158, 161-162].
>
> June 9, 1952, pp. 403-404, 490 [R. 179-180, 196-197].
>
> June 10, 1952, pp. 538, 555, 586, 617, 631 [R. 210-211, 216, 223, 229-230, 230-231].
>
> 2. On numerous occasions, he persisted in repeating questions, previously excluded by the court, in order to evade the court's rulings, in spite of admonitions by the court to the contrary. Many of these questions were obviously intended to besmirch a witness.
>
> June 3, 1952, pp. 189-191, 200-202, 225, 260-W, 260-Z-1 [R. 54-55, 56-57, 59, 59-62].
>
> June 4, 1952, pp. 21, 322-323 [R. 84-85, 122-123].
>
> June 5, 1952, pp. 25, 38, 52, 121, 161 [R. 129-130, 131-132, 135-136, 144, 151].

June 9, 1952, pp. 374, 382-383, 393-394, 402, 410-411, 462-463, 480, 482 [R. 172, 173-174, 174-175, 178-179, 182, 190, 191-192, 193].
June 10, 1952, pp. 570, 576, 579, 586, 592, 594, 598, 683 [R. 219-220, 220-221 221-222, 222, 225; 226, 227-228, 235].

* * *

6. On several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation. Thus, he asked Mary Ott, the victim of the abortions charged against the defendant, "*When* were you arrested in this case?" As a matter of fact she never had been arrested and when called to account by the court, Offutt only answered that he had a right to enquire *whether* the witness had been arrested in this case.

June 2, 1952, pp. 99-101 [R. 50-52].
See also, June 5, 1952, p. 161 [R. 151].

* * *

12. He constantly tried to create an episode that might lead the court to direct a mistrial.

A sharp conflict exists between the Government's view, that petitioner initially provoked and is primarily responsible for the altercations with the court, and the impression which petitioner seeks to convey, that his entire course of conduct was a proper response to "great provocation" (Br. 5)

from a hostile and biased judge and constituted "the fearless, vigorous and effective performance of the duties pertaining to the office of advocate" (Br. 7). The resolution of this conflict requires consideration of substantially the entire record of the *Peckham* trial, which was incorporated by reference in the judge's findings of contempt (R. 26), and not merely the instances of altercation which have been compressed into the printed joint appendix,[6] which omits many rulings in favor of petitioner and fails to disclose the relatively normal atmosphere which prevailed during substantial portions of the trial.

No summarization or selection of excerpts from the trial transcript can properly capture the atmosphere, on the one hand, of those periods of relative calm, when rulings favorable to petitioner and his client were being made (e.g. Gov. App. pp. 51-74, *infra*), and, on the other, the cumulatively improper conduct of petitioner, which gradually subjected the trial judge to an increasing degree of provocation and which gave rise to petitioner's contempt conviction (e.g. pp. 12-24, *infra*, and Gov. App. pp. 74-82, *infra*). As shown by the excerpts and transcript references collected in Appendix A to this brief, great latitude was allowed petitioner on such occasions as he chose to comply with customary standards (Gov. App. pp. 51-74, *infra*).

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[6] This was recognized by the Court of Appeals when it stated: "Appellant's conduct cannot fairly be considered apart from that of the trial judge. Each responded to great provocation from the other" (R. 266).

While it is impossible for any written record to convey the nuances of tone and manner which may, in themselves, be conclusive on the question of contempt, a reading of the entire trial transcript suggests the situation in a way which no excerpts can do. The selectivity necessary in any set of selections, including those found in the printed joint appendix, necessarily results in a disjointed and somewhat distorted view of the record. Here, in a few pages, it is only possible, with a small number of illustrative examples, to suggest a very little of the general atmosphere which the whole record conveys.

(1) *June 2, 1952*

Petitioner states that "the first three days of trial relations between the court and petitioner were without serious incident" (Br. 9). However, the following example of cross-examination, which occurred early in the trial, shows a typical incident and gives an idea of the problem before the court. The first of two principal witnesses for the Government was Mary M. Ott, who had testified that defendant Peckham had twice performed abortions on her. Almost at the start of Mrs. Ott's cross-examination, petitioner began questioning her as to whether she had talked to the prosecutor about the case, when he said (R. 50; Tr. 156):

> By the way, when were you first arrested in connection with this case?

After objection by the prosecutor that there was no arrest, the court called a conference at the bench, and the following occurred (R. 50-52; Tr. 157-158):

The COURT: Just what is the meaning of the question, Mr. Offutt, about the witness being arrested?

Mr. OFFUTT: I want to know when she was arrested.

The COURT: Well, was she arrested?

Mr. MCLAUGHLIN: Never.

Mr. OFFUTT: I will ask her that question.

The COURT: You had no right to say when she was arrested.

Mr. OFFUTT: I have no right to inquire into whether she was arrested?

The COURT: You did not ask her that. You asked when she was arrested.

Mr. OFFUTT: That's right.

The COURT: That assumes that she was. I am going to make a statement before the jury that that is an improper question.

Mr. OFFUTT: I want to ask if she was arrested.

Mr. MCLAUGHLIN: They couldn't arrest her.

Mr. OFFUTT: They certainly could.

The COURT: Well, did they?

Mr. MCLAUGHLIN: No.

The COURT: Don't you know?

Mr. OFFUTT: The officers won't talk to me. Mr. McLaughlin told them not to talk to me.

The COURT: I think that was quite proper, but you could ask Mr. McLaughlin.

Mr. OFFUTT: I will put him on the stand and ask him.

The COURT: Why would they arrest her?

Mr. OFFUTT: Because of a number of things.

The COURT: On what charge?

Mr. OFFUTT: They could arrest her on adultery; they could arrest her on fornication——

The COURT: That's silly.

Mr. OFFUTT: Is it silly?

The COURT: Yes.

Mr. OFFUTT: They could arrest her in connection with a conspiracy; they could——

The COURT: Go back to counsel table, gentlemen.

(Thereupon counsel resumed their places at the trial table, and the following proceedings were had in open court:)

The COURT: The question asked by counsel as to when she was arrested is improper, because it implies that she was arrested. There is no evidence that she was arrested.

Were you ever arrested in connection with this case?

The WITNESS: No, sir.

The COURT: The question was highly improper.

Petitioner then started questioning Mrs. Ott about her admission into Mt. Alto hospital, and the following occurred (Tr. 161-162):

> Q. The man that you had held out to be your husband was there in the Raleigh Hotel with you when you made that call, wasn't he?
>
> A. I didn't hold out——
>
> The Court: Just a moment. There is an assumption in that question for which there is no basis in the record, as yet.

Petitioner cross-examined the witness as to whether she had not held out one William Jones as her husband, but the witness stated that she never had held out Mr. Jones as her husband (Tr. 162).

(2) *June 3, 1952*

Petitioner's cross-examination of Mrs. Ott was punctuated with a number of incidents when it was continued throughout nearly all of a second day.

In the course of questioning Mrs. Ott as to the time George Christenson[7] accompanied her to Dr. Peckham's office, petitioner asked what Christenson said when informed that she intended to communicate with Peckham relative to the abortion (R. 54; Tr. 252). At this point, the court intervened, stating: "Just a moment. I am going to exclude what George Christianson [sic] said. That has nothing to do with the case, at this stage of the case" (R.

[7] Mrs. Ott had testified that she had been living with Christenson and had held him out as her husband, that he had accompanied her to Dr. Peckham's office, and that he had been with her in a hotel room when the foetus involved in the first abortion was passed (Tr. 74, 87, 91, 94, 168-169).

54; Tr. 252). Petitioner continued his cross-examination as follows (R. 54-55; Tr. 253-254):

Q. Had George told you that he objected to it?

Mr. McLAUGHLIN: That is the same thing, Your Honor.

The COURT: I told you, Mr. Offutt, that I shall exclude anything that George Christianson [sic] said to this witness because that is not proper cross examination.

Mr. OFFUTT: I am not going to ask her what he said, Your Honor; I am just going to refer to the objection, that's all, not the conversation.

The COURT: That is another way of getting around my ruling.

Mr. OFFUTT: She has already said that on direct examination, Your Honor.

The COURT: You may proceed, Mr. Offutt. I have made my ruling and you have to comply with it.

Mr OFFUTT: I can't ask any—you said that—so that I will be clear about it, I can't ask any——

The COURT: Any statements made by George Christianson [sic] to this witness are not proper cross examination, and I will exclude them at this time.

Mr. OFFUTT: All right.

By Mr. OFFUTT:

Q. You said that George objected to it. When did he object to it? Give us the date.

Mr. McLaughlin: Now, he is right back again, Your Honor.

Mr. Offutt: I don't want the conversation.

The Court: Now, Mr. Offutt——

Mr. Offutt: I misunderstood Your Honor's ruling.

The Court: No, I think you understood.

Mr. Offutt: I did not, I give you my word of honor.

The Court: You can't be as stupid as all that. Do not transgress my ruling again.

Proceed and ask another question.

Mr. Offutt: All right.

Immediately, thereafter, however, the following occurred (R. 54; Tr. 254):

A. When is the last time you saw and talked to George Christianson [sic] before today?

Mr. Mc Laughlin: I can't see the materiality of that, your Honor.

The Court: No, I think that is proper.[5]

As Mrs. Ott's cross-examination continued, other incidents occurred (R. 58-59, 59-61, 64-65, 67-68, 68-69, and 69-70). The following is an example of a typical admonition given petitioner (R. 69; Tr. 384):

The Court: Don't talk in that belligerent tone to the witness.

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[5] On numerous other occasions during Mrs. Ott's cross-examination the court overruled objections by the prosecution (e.g. Tr. 194, 200, 208, 210, 211, 215, 278, 302, 303, 308, 309-311, 330, 373).

Mr. OFFUT: I didn't mean it that way, Your Honor, I assure you.

The COURT: I am sure you didn't, but still, let it not be done.

Mr. OFFUT: We get a little excited here, Your Honor.

(3) *June 4, 1952*

On June 4, 1952, petitioner requested, and was granted, leave to call a witness out of turn, with the court's assurance that it would not affect his "right to make a motion for acquittal at the close of the Government's case" (R. 76-77; Tr. 415-416). This witness, whom petitioner had subpoenaed to Washington from Erie, Pennsylvania, was the mother of Mary Ott. She was anxious to be excused because she had young children to take care of at home in Erie.

No relevant testimony was extracted from her. After answering several preliminary questions, the witness, Mrs. Hodges, was asked to state the number of years Mrs. Ott had lived away from Erie. The prosecuting attorney's objection to the question was sustained (R. 78; Tr. 418-419). She was then asked if she was before the court in response to a subpoena. The court, of its own motion, excluded the question as immaterial. Thereupon the following colloquy occurred (R. 79; Tr. 419-420):

Mr. OFFUT: If Your Honor please, if I am going to have interruptions like this, I don't want to examine the witness at all. I want to

examine this witness and I want to have free opportunity to present what I have.

The COURT: Now, you are getting insolent.

Mr. OFFUT: I don't mean it insolently.

The COURT: You will have to conduct your examination within the framework of the rules of evidence as the Court construes them. Now, proceed.

Mr. OFFUT: Well, I will have to wait until I present my case.

The COURT: You may proceed now.

Mr. OFFUT: Are you ordering me to proceed? I would rather wait now until my case is over.

The COURT: I direct you to proceed.

Mr. OFFUT: May I object to being ordered to proceed at this time?

Petitioner asked the witness when she had first discussed the *Peckham* case with him. Before a response was made, the court announced that it would not permit the disclosure of any conversation between the witness and petitioner. Petitioner withdrew the question (R. 79; Tr. 420). After the court had overruled some objections by the prosecutor (R. 80-81; Tr. 421-422), petitioner asked about conversation with a member of his office (R. 81; Tr. 422). An objection was immediately interposed by the prosecutor and sustained by the court. Petitioner then stated in open court (R. 81; Tr. 422):

If Your Honor please, I object to Your Honor raising your hand and leaning forward

> and looking at the District Attorney before he makes an objection.

Petitioner was immediately summoned to the bench and warned that if he continued making "insolent remarks" he would be sent to jail for contempt of court at the end of the trial. Petitioner replied: "I don't mean it as a discourtesy. Judge Stephens said we should put these things in the record as they happen, and I saw Your Honor did it yesterday, you screamed so and you jumped forward and I thought you had said something". The trial judge then told petitioner: "Go back to counsel table; I have given you my warning" (R. 81-82; Tr. 422-423).[8]

Petitioner continued to cross-examine the witness as to service of the subpoena and her conversations with her daughter after she came to Washington (R. 82-84; Tr. 423-426), the judge overruling several objections by the prosecution (R. 83; Tr. 425; R. 84; Tr. 426). The court suggested that petitioner elicit relevant information from the witness (R. 84; Tr. 427 and R. 86; Tr. 429). Petitioner then asked about the telephone call Mrs. Ott had made to him the previous Sunday and when he explained that he hoped to contradict the daughter's testimony the court let him proceed (R. 86-87; Tr. 430-431). The mother said she had not heard the conversation (R. 87; Tr. 431), at which point petitioner said (R. 88; Tr. 431-432):

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[8] A substantially similar incident occurred later in the trial (R. 223; Tr. 1123).

If Your Honor please, I object to this witness Ott—I call Your Honor's attention, she was nodding her head forward. Your Honor, that is the very reason I object to Mrs. Ott being in the front row, looking at the witness.

The prosecutor said that petitioner was trying to be sensational, and subsequently the following occurred (R. 88-89; Tr. 432-433):

The COURT: You are guilty of a serious breach of decorum. Please bear in mind the admonition I made at the bench.

Proceed.

Mr. OFFUT: May I have the question read and the answer, please, Your Honor?

The COURT: No. You ask the question again. You interrupted yourself, you know, by this commotion.

Mr. OFFUT: Your Honor, I object to that statement by the Court. I thought I was bringing something to the Court's attention.

The COURT: Yes, but you did it in an excitable manner and—

Mr. OFFUT (Interposing): It's enough to get excited.

The COURT (Continuing):—and in a boisterous manner.

Mr. OFFUT: I didn't mean to be boisterous.

The COURT: I assume that you didn't mean that, but that is no excuse for a breach of decorum. Proceed.

When the witness was asked if she brought the letters asked for in the subpoena, she said she had none to bring (R. 91; Tr. 436). Mrs. Hodges was asked whether she received any letter from Mrs. Ott stating that she had attempted to bring about a miscarriage on herself and the witness replied that she had not (R. 97; Tr. 445).

(4) *June 5 to June 16, 1952*

As the trial progressed, there continued to be a rapid increase in the number of incidents (e.g. R. 128-129, 130-131, 135-136, 137-138, 139-142, 154, 159, 159-160, 161-162, 167, 173-174, 179-180, 196-197, 198-200, 207-208, 210-211, 213-215, 217, 223, 226-227, 229-230, 242, 243-244, 245, 246, 253), in spite of persistent admonitions and reprimands. For instance, at the opening of court on June 5, there was a bench conference, at which the court denied petitioner's motion for a mistrial on the grounds that the newspapers had carried an account of petitioner's differences with the court, and denied his request to recall Mrs. Ott for further cross-examination (R. 123-127; Tr. 568-574). After petitioner returned to the counsel table, the judge began to talk to the court reporter, when petitioner again approached the bench and the following discussion occurred (R. 127; Tr. 574):

> Mr. Ottley: I didn't hear what was taking place. What was it?
>
> The Court: I think this is a conference between the Court and the reporter.
>
> Mr. Ottley: In connection with this case?

The COURT: No. It was a private conference between the reporter and the Court.

Mr. OFFUT: Was it in connection with this case?

The COURT: You are insolent in asking that. I said it was a private conference between the reporter and the Court.

As these incidents continued, the trial judge began to show signs of losing patience with petitioner. An extreme example is set out in full in the appendix to this brief (Gov. App. pp. 77-82, *infra*). This episode was provoked when petitioner persisted in arguing after the court had overruled one of his objections, and refused to return to his seat at the counsel table, though twice directed to do so by the court. The court a third time directed him to go back, this time coupled with the statement "Stop, or I will have the Marshal pull you back to your seat." At this point the petitioner resumed his seat and the following took place (R. 214-215; Tr. 1082):

Mr. OFFUT: If the Court please, I respectfully move Your Honor for a mistrial and——

The COURT: Motion denied.

Mr. OFFUT (Continuing):—and I want to put the proffer on the record at this time——

The COURT: Motion denied.

Mr. OFFUT: And I want the record to show that Your Honor raised your hand——

The COURT: Motion denied.

Mr. OFFUT: (Continuing)——and ordered me back from the bench.

The COURT: Motion denied. Proceed.

Mr. OFFUT: I object to Your Honor yelling at me and raising your voice like that.

The COURT: Just a moment. If you say another word I will have the Marshal stick a gag in your mouth.

You proceed with the examination of the witness. Proceed.

However, interspersed between such episodes, there were times when petitioner complied with customary standards of advocacy, developed relevant testimony, and refrained from provocative, disorderly and improper conduct. A reading of the liberal and full direct examination permitted petitioner when defendant Peckham was testifying in his own defense (Tr. 1228-1364) illustrates the complete absence of any showing of hostility towards petitioner on the part of the trial judge, even after such incidents of exasperation at petitioner as that described just above (pp. 23-24, *supra*), whenever petitioner met customary standards. A few examples of these periods of relative calm, are included in Appendix A to this brief (Gov. App., pp. 51-74, *infra*).

Further examples of petitioner's continued attempts to cause the disintegration of the *Peckham* trial and to provoke the judge into an episode which might require a mistrial, are to be found in Appendix B to this brief (Gov. App. 74-82, *infra*) and repeatedly throughout the entire trial transcript.

SUMMARY OF ARGUMENT

I

Petitioner's conduct, displayed time and time again throughout the *Peckham* trial and in the face of repeated warnings and admonitions, was insolent, obstructive, disorderly and openly contemptuous.

Consideration of the entire trial transcript makes clear beyond question the correctness of the Government's position that petitioner initially instigated and is primarily responsible for the altercations and incidents which marred the trial and which on occasion finally provoked the trial judge to sharp and hostile comments directed at such misbehavior. Petitioner's claim, that his whole course of conduct was an entirely proper response to "great provocation" (Br. 5) at the hands of a prejudiced judge, is not only wholly unsupported by the trial record but involves obvious distortion of the two opinions of the Court of Appeals (R. 264-267 and 269-290).

II

Petitioner cannot escape punishment at the hands of the trial judge for the repeated contempts committed in his presence in open court, merely because he succeeded in some degree in disturbing the judge's imperturbability and at times in provoking sharp retort from the bench. This is particularly so where, as here, any such hostility as may have been displayed was carefully limited to the misbehavior which provoked it. Otherwise, all a

contemnor need do, in order to escape summary punishment, would be to resort to conduct calculated to provoke the trial judge into making some unjudicial comment.

Nor can petitioner escape such punishment because of the reversal of the conviction of petitioner's client Peckham. This reversal was predicated, as the Court of Appeals explained (R. 283-284), upon the necessity of taking "scrupulous care" not to have the jury weigh petitioner's misconduct against his client, the court having failed to instruct the jury in this regard.

The record shows no basis for disqualifying the trial judge from exercising his power, under Rule 42(a) of the Federal Rules of Criminal Procedure, to punish petitioner summarily for his repeated disorderly contempts. There is no support for petitioner's contention, in the light of the entire trial record, that the trial judge was in any way incapable of fairly adjudicating whether petitioner was guilty of contempt. Such an adjudication can be properly exercised, as here, at the close of trial, and by a judge at whom some of petitioner's misconduct was directed, the procedure approved in *Sacher* v. *United States*, 343 U.S. 1.

Petitioner's contempt conviction was, therefore, a proper and appropriate exercise of the court's summary contempt power. Petitioner's modified sentence of forty-eight hours' confinement takes into account all possible mitigating factors, and constitutes a minimum penalty, considering the flagrant character of his repeated misconduct.

ARGUMENT

I

Petitioner Was Guilty of Gross Misconduct Involving Repeated Instances of Insolence, Obstructive Action, Disorderly Disregard of the Court's Rulings and Orders, and Other Improper Conduct.

The record in this case leaves no inkling of a doubt but that petitioner was, as the court below held, guilty of insolent and offensive conduct. And as in *Sacher* v. *United States*, 343 U.S. 1, 5, the findings herein are "not based on an isolated instance of hasty contumacious speech or behavior, but upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous."

The record shows that the bulk of the incidents resulted from two general methods of attack which were followed by petitioner. *First*, through persistently insulting and belligerent conduct, continued repetition of irrelevant objections and exceptions and calculated disobedience of the court's rulings and orders, petitioner attempted, as found by the trial judge (R. 28), and affirmed by the Court of Appeals (R. 266), to provoke the trial judge into an incident which would necessitate the declaration of a mistrial. *Second*, contrary to the explicit and repeated orders of the trial court, petitioner attempted to, and more than frequently succeeded in, introducing evidence which was wholly irrelevant to any issue before the court, merely for the purpose of (a) confusing the jury as to the

guilt of the defendant Peckham, (b) besmirching and villifying the character and reputation of various witnesses, and (c) humiliating the prosecutrix, her mother, and friends [19] in the eyes of the jury and the public.

We have set forth in the Statement (pp. 12-24, *supra*) only a few of the many instances of such misconduct. For example, it has been impossible to set forth the many times that petitioner deliberately disregarded the rulings of the court and proceeded to reiterate, in essentially the same form, a line of questioning that had been excluded (e.g. R. 85, 89-93, 119-121, 122-123, 129-130, 133-134, 144, 151-152, 157-158, 166-167, 172-174, 182, 190, 192-193, 198, 200, 219-222, 223-224, 225, 232-234, 235-236, 239-240). Such a continuous disregard of the rulings of the court cannot possibly be justified as necessary to protect the interests of petitioner's client. The court meticulously permitted petitioner to note the objections which he wished to make (e.g. R. 90, 119, 125, 175, 182, 221, 238). The vice here, just as in *Hallinan* v. *United States*, 182 F. 2d 880, 887 (C.A. 9), certiorari denied, 341 U. S. 952, was not petitioner's desire to get his evidence before the court or to make a record thereof for appeal, "but the manner in which it was attempted to be accomplished." As in the *Hallinan* case,

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[19] The complete direct examination of Lieutenant Donahower, an Air Force officer, is a particularly striking example of this particular type of abuse (R. 200-204; cf. R. 204-206, 47-49). Not a single relevant question was asked of this witness, who had been held under subpoena for several days.

supra, at 887, it is clear that petitioner "went far beyond the necessity of making a record and that his conduct shows a deliberate and studied design to ignore the rulings of the Court in order to get before the jury the excluded matter." [11]

Similarly, petitioner's repeated rude and discourteous remarks cannot be justified, as he now attempts (Br. 25), on the theory that he merely sought, in compliance with the rulings in *Butler* v. *United States*, 188 F. 2d 24 (C.A. D.C.), *Billeci* v. *United States*, 184 F. 2d 394 (C.A. D.C.), and *Vinci* v. *United States*, 159 F. 2d 777 (C.A. D.C.), to have the record reflect the judge's personal mannerisms, which he deemed prejudicial to his client. Petitioner failed to comply with the fundamental requirement announced in those cases that objections for the record to the intonations and gestures of the trial judge must be made out of the jury's hearing. On at least sixteen occasions in the jury's presence, petitioner was insolently and openly critical of the trial judge's personal mannerisms (R. 81, 130-131, 154, 161-162, 173-174, 196-197, 210, 214-215, 223, 226, 231, [redacted], 250-251, 253 and Tr. 1098, 1341 and 1460). In none of these instances did petitioner request a bench conference

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[11] *Caldwell* v. *United States*, 28 F. 2d 684 (C.A. 9), which petitioner cites (Br. 25), is not in conflict with the *Hallinan* case. In the *Caldwell* case, the court held that an isolated instance of repetition, by an attorney, of an excluded question, without any evidence of intent to evade the court's ruling, did not constitute contempt of court. In that case, there was no relentless effort, as in the present case, to bring excluded matters to the knowledge of the jury.

for the purpose of making or considering an objection of this type, although he frequently requested such conferences for other specified purposes.[12] The record as a whole conveys the convincing conclusion that petitioner was deliberately and insolently trying to use the rule of the above-cited cases as a method of baiting the trial judge and creating disorder at the trial.

The record does not support petitioner's contention that he was goaded into his conduct by the court. A reading of the transcript makes it perfectly clear that, to whatever extent the trial judge may have exceeded the strict limits of judicial imperturbability, each instance was provoked by petitioner. The excerpts cited by the Court of Appeals in the appendix to the *Peckham* decision (R. 285-290) cannot fairly be judged alone, but must, as that court recognized (R. 266), be considered in the light of petitioner's provokingly insolent conduct and his continuous deliberate attempts to inject all sorts of extraneous issues into the case. No trial judge could have properly conducted the trial in the face of petitioner's tactics without in-

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[12] Many of petitioner's requests for bench conferences were granted (e.g. R. 145-146, 163, 177-180, 185-186), although a number of such requests were refused, when the reasons given appeared to be without merit (e.g. R. 136, 156, 218). It is significant that on no occasion when a bench conference request was either granted or refused did petitioner indicate that he wished to record a so-called *Billeci* type objection. Occasionally such objections were noted during bench conferences which had been requested for other purposes (e.g. R. 179-180).

jecting himself into the case to some extent, if examination and cross-examination were to be kept anywhere within reasonable limits of relevancy.

The Court will find, on a reading of the transcript, that most of the altercations between the trial court and petitioner arose when petitioner attempted to go far beyond the limits of propriety, particularly in his attempts to try the complaining witness rather than defendant Peckham. The trial court was well aware that the credibility of Mrs. Ott was an important issue in the case and a reading of her two hundred page cross-examination (Tr. 155-183, 185-217, 227-323, 334-367, 373-392) shows that petitioner was allowed great leeway in examining her. But, manifestly, the court could not properly allow to pass unchallenged a question like "When were you arrested" (R. 50) especially since petitioner surely knew that she had not been arrested at all.

The examination of Mrs. Hodges, the mother of Mrs. Ott, is a good example of the problem which petitioner's tactics presented to a trial court. The whole examination (Tr. 418-448) is so full of irrelevancies that it is hard to believe that petitioner called the witness in good faith. Certainly there was nothing in the judge's conduct in excluding several irrelevant questions (R. 78-79) to justify petitioner's outburst to the effect that, if he were going to be interrupted, he did not want to examine the witness (R. 79). Petitioner's tirade had absolutely no relationship to the correctness of the court's ruling at that moment.

On the whole record, it is difficult to escape the conclusion that petitioner deliberately tried to create an incident whenever he was in any way curtailed in his attempts to inject into the record prejudicial irrelevancies involving the details of Mrs. Ott's private life. [13]

II

The Trial Judge Properly Held Petitioner Guilty of Contempt Committed in His Presence in Open Court

A. *The record shows no basis for disqualifying the trial judge from adjudicating petitioner's contempt, since any hostility displayed by the court was directly provoked by petitioner's own repeated misconduct and was carefully limited to such misbehavior.*

Petitioner argues that the reversal by the Court of Appeals of the conviction in the *Peckham* case necessarily establishes that the trial court was too biased to be able properly to adjudicate him in contempt. The Court of Appeals obviously did not consider its *Peckham* decision as so holding since

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[13] Petitioner's contention (Br. 27) that the findings under the specifications affirmed by the court below are void, because they do not include any finding that his misconduct was committed wilfully or in bad faith, is without substance. The certificate of contempt (R. 25-29) leaves no doubt that the trial court found petitioner guilty of deliberate and wilful misconduct in the court's presence. It states that the trial court found that petitioner was "insolent", "insulting" and "discourteous." These terms can be read only in terms of wilfulness. The certificate further states that petitioner "persisted in repeating questions", many of which "were obviously intended to besmirch a witness", and that he "tried to create an episode that

the same three judges affirmed petitioner's conviction for contempt. As that court explained in its *Peckham* opinion (R. 283-284):

> We are all agreed that the misconduct of appellant's counsel [petitioner] which helped produce such atmosphere is for the contempt proceedings against counsel, and scrupulous care must be taken not to weigh such misconduct against appellant.

There is no basis in the record for reaching the conclusion that the trial judge demonstrated any bias against petitioner other than a strong dislike of his contumacious conduct.

Similarly, there is no basis in the record for concluding that the trial court had any bias or lack of impartiality towards petitioner's client. Petitioner's statement (Br. 12) that the Court of Appeals "affirmatively found" that the trial judge showed hostility, bias and a lack of impartiality against petitioner's *client* is wholly without support. As

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might lead the court to direct a mistrial." These phrases necessarily imply that petitioner's misconduct was intentional, deliberate and wilful.

In any event, the conduct thus described was contemptuous *per se* and required no words of explanation or elaboration. *MacInnis* v. *United States*, 191 F. 2d 157 (C.A. 9), certiorari denied, 342 U.S. 953; *United States* v. *Bollenbach*, 125 F. 2d 458 (C.A. 2); see *Berkon* v. *Mahoney*, 268 App. Div. 825, 49 N.Y.S. 2d 551 (1944), affirmed without opinion, 294 N.Y. 828, 62 N.E. 2d 388 (1945). Contempt is usually determined by the nature of the act done. When the circumstances are such that no inference save that of his wilful contumacy is reasonably possible, the contemnor will not be allowed to quibble about the precise state of mind and feelings. See *Wartman* v. *Wartman*, 29 Fed. Cas. No. 17,210 (C.C. D. Md.).

that court's opinion makes clear, Peckham's conviction was reversed on a divided vote solely because two of the three judges, in taking "scrupulous care" not to have the jury weigh petitioner's misconduct against his client, concluded "in the light of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that [Peckham] was fairly tried" (R. 283-284).

Petitioner (Br. 14) attempts further to magnify out of all proportion the language of the *Peckham* opinion by confusing the court's statement of Peckham's arguments with its actual holding. In describing Peckham's contentions, that court stated (R. 281):

> A number of other questions are presented generally. These include claims of degrading and belittling remarks directed at defense counsel by the judge, restrictions upon cross-examination, the judge's assumption of the function of an advocate, lack of impartiality,[14] and prejudicial remarks by the prosecutor.

In ruling on these particular claims, the court said (R. 281-282):

> As to the effect of these matters on the fundamental fairness of the trial this court finds itself divided. Judge Edgerton and Judge Bazelon, constituting a majority of the court,

[14] [Footnote by court:] "The statement of the court to the jury, after they had returned their verdict, indicating his strong feelings as to the guilt of defendant does not show error in the conduct of the trial itself."

> are convinced that the excessive injection of the trial judge into the examination of witnesses, his numerous comments to defense counsel, indicating *at times* hostility, *though under provocation*, demonstrated a bias and lack of impartiality which *may* well have influenced the jury;[15] that, considering these matters and others,[16] examples of which are set forth in an Appendix attached hereto, this court is barred from sustaining the judgment as the product of a fair and impartial trial. This necessitates reversal. [Emphasis added.]

Judge Fahy, the third member of the court, dissented on the ground that the distinction drawn by the jury, in convicting Peckham on the one count which was very strongly supported by the evidence and acquitting him on the other which was less well corroborated, "indicate[d] an impartial consideration of the evidence" (R. 283). He further noted (R. 283):

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[15] [Footnote by court:] "Throughout the fourteen day trial there were numerous clashes between defense counsel, on the one hand, and court and prosecutor, on the other. Although defense counsel never requested the court to admonish the jury that these unfortunate incidents were not to be taken against appellant, the majority believes that minimal precautions required such admonition either at the time they occurred or in the charge to the jury. See, for example, *United States* v. *Dennis*, 183 F. 2d, 201, 225 (2d Cir.), *affirmed*, 341 U. S. 494; and *Mansfield* v. *United States*, 76 F. 2d 224, 232 (8th Cir.), *cert. denied*, 296 U. S. 601, where such instructions were given."

[16] [Footnote by court:] "Including some of those which we have previously discussed and which the majority concede would not, standing alone, amount to prejudicial error."

> * * * the defense was fully presented from an evidentiary standpoint, there was full enough cross-examination of all Government witnesses, the relevant aspects of their characters and lives, as of all other witnesses, were brought to light before the jury, and the jury were adequately instructed.

That petitioner at times provoked the judge into sharp comment certainly does not excuse petitioner's contempt. Otherwise, all a contemnor need do, in order to escape summary punishment, is to resort to conduct calculated inevitably to provoke the trial judge into making some unjudicial remarks or comment. In *Fisher* v. *Pace*, 336 U. S. 155, 162-163, this Court, although recognizing that "[t]he conduct of a judge should be such as to command respect for himself as well as for his office", held: "We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show contempt for judge and court".[17] In this case there was no intent whatsoever on the judge's part to provoke petitioner. There was merely at times, under petitioner's provocation,

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[17] In cases in other jurisdictions, although the question of the trial judges' disqualification on grounds of their provocation of the contemnors was not, just as in the *Fisher* case, directly involved, the courts have held the provocations to be merely a possible mitigating circumstance warranting only modification of the sentences imposed. See *Rothbard* v. *Brennan*, 263 App. Div. 991, 33 N.Y.S. 2d 361 (1942); *Pugh* v. *Winter*, 253 App. Div. 295, 2 N.Y.S. 2d 9 (1938); *Deskins* v. *State*, 62 Okla. Crim. 314, 71 P. 2d 502 (1937); see also *United States* v. *Markewich*, 261 Fed. 537 (S.D. N.Y.).

a loss of calm which unfortunately seems only to have incited petitioner to further impertinent retorts. Certainly such of the judge's comments as might possibly have aggravated petitioner were, when considered in the light of petitioner's conduct, less provocative than the judge's remarks which led up to the single instance of contempt in the *Fisher* case.[18] In fact, in the latter case, the trial judge initiated the provocation, which led to the contemptuous acts. In the instant case, the trial judge's judicial restraint gave way only after he himself had been provoked by a prolonged series of contemptuous acts by petitioner.

At the most, any provocation to which petitioner might have responded resulted from what the court below called the trial judge's "excessive injection * * * into the examination of witnesses, [and] his numerous comments to defense counsel, indicating at times hostility, though under provocation" (R. 281). This could have related only to the portion of petitioner's conduct described in the first specification of the judge's certificate, i.e., petitioner's "insolent, insulting and offensive

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[18] Facts *dehors* the record in the *Fisher* case showed grounds warranting a strong inference of bias on part of the trial judge. The counsel held in contempt was running against the judge, who was seeking reelection. See *Comment*, 34 Iowa L. Rev. 673, 676 (1949); *Beaumont Enterprise*, Feb. 8, 1949, p. 1, col. 6. Also the counsel opposing the contemnor at the trial was the trial judge's son. See *Comment*, 34 Iowa L. Rev. 673, 676 (1949); Petitioner's Brief in No. 45, Sup. Ct. Oct. Term 1948. The contempt involved in that case occurred during a trial in a state court of Texas, where the relationship of judge to opposing counsel is not disqualifying. *Postal Mutual Indem. Co.* v. *Ellis*, 140 Tex. 570, 169 S.W. 2d 482 (1943).

remarks" and "gross discourtesy to the court" (R. 26). The judge's conduct could have had no relation to that part of petitioner's misconduct described in the remaining three specifications upheld by the court below, namely, that petitioner "persisted in repeating questions," many of which were "intended to besmirch a witness" and though "previously excluded by the court," were made "in order to evade the court's rulings, in spite of admonitions by the court to the contrary"; that "[o]n several occasions he asked of witnesses questions that were highly prejudicial to the witness and for which there was no foundation"; and that "[h]e constantly tried to create an episode that might lead the court to direct a mistrial" (R. 26-28). Thus, many aspects of petitioner's misconduct cannot be attributed to any possible aggravation at the hands of the trial judge.

There were occasions, late in the *Peckham* trial, after he had been subjected to the constant pressure of petitioner's disgraceful conduct, when the trial judge expressed himself with more sharpness than might have been hoped for, but, as hitherto emphasized, individual displays of temper by either court or counsel cannot fairly be judged except in the context of the entire record. Fairly read as a whole, the record clearly establishes that provocation, both initially and in the main, came from petitioner, and not the judge.

Furthermore, a holding that frequent altercations between court and counsel, unaccompanied by any admonition to the jury not to take such incidents against petitioner's client (R. 281-282 fn.

14), created too disorderly an atmosphere to be sure that the client received a fair trial, does not establish that the court was unable to judge fairly whether counsel had embarked on a deliberate and wholly unjustified course of contumacious conduct.

The type of hostility which the trial judge was prevoked into displaying by petitioner's repeatedly insolent, disorderly and obstructive misconduct, appears to have been no greater than that displayed from the bench, under somewhat similar provocation, during the trial in *Dennis* v. *United States*, 341 U. S. 494. See appendix to dissenting opinion of Frankfurter, J., in *Sacher* v. *United States*, 343 U. S. 1, 42-89. Such provoked hostility was held by this Court, in the *Sacher* case, not to disqualify the trial judge from taking summary action, at the close of the trial, to punish counsel for their repeated contempts.

In the *Dennis* case, no reversal of the defendants' conviction was required, by reason of the trial court's displays of provoked hostility toward counsel, because, as held by the Second Circuit, "Throughout, the judge kept repeating to the jury that they were not to take what he said to the attorneys against their clients." *United States* v. *Dennis*, 183 F. 2d 201, 225, affirmed without consideration of this point, 341 U. S. 494. In *Peckham*, however, no such admonitions were made by the trial judge. As the court below noted in its *Peckham* opinion (R. 282):

> Although defense counsel never requested the court to admonish the jury that these unfor-

> tunate incidents were not to be taken against appellant, the majority believes that minimal precautions required such admonition either at the time they occurred or in the charge to the jury.

The trial court's failure in this regard explains why the Court of Appeals reversed Peckham's conviction, but nevertheless affirmed the summary contempt holding against petitioner, after taking into consideration every possible mitigating factor and reducing his confinement sentence from ten days to forty-eight hours.

The record in this case shows that the trial judge never let his annoyance at petitioner's disgraceful conduct influence his judgment on legal matters. Time after time, the judge, after reprimanding petitioner for a breach of decorum, ruled in petitioner's favor, when he offered a sound legal position. Thus, in the cross-examination of Mary Ott, after the court had ruled that it would exclude questions designed to elicit from her what Christenson had said and petitioner still continued to ask questions along such line (R. 54-55), the court ruled that a question as to when the witness had last seen Christenson was proper (R. 54). On numerous other occasions during her cross-examination, the court overruled objections by the prosecution (e.g. Tr. 194, 200, 208, 210, 211, 215, 278, 302, 303, 308, 309-311, 330, 373). After petitioner's outburst during the testimony of Mrs. Hodges (R. 79), the court overruled several objections by the

prosecutor to questions asked by petitioner (R. 80-81). The discussion at the bench as to what use could be made of the medical records in fairness to defendant without violating the witness's privilege (R. 113) shows how the judge endeavored to be completely fair when faced with what he regarded as a genuine legal problem.

Despite all the various incidents that occurred during the presentation of the government's case, the discussion on petitioner's motions, both at the close of the government's case and at the close of all the testimony, shows that the judge was calm and reasonable whenever petitioner behaved in a proper manner (Tr. 817-823, 1700-1726). The court showed great leniency in permitting examination of a witness who had made a telephone call to Mrs. Ott for Christenson while Christenson was in jail, stating that he would not curtail the examination although he could not see the materiality (Tr. 882). On another occasion, the court undertook to explain to the prosecutor the possible relevancy of petitioner's questions (Tr. 903). The court's most direct evidence of annoyance with petitioner occurred on June 10, after petitioner had made a formal motion for a mistrial and continued to argue with the judge after he had made his rulings (R. 207-208, 210-211, 213-215). But thereafter the court displayed considerable patience during examination by petitioner of the prosecuting attorney for the government (Tr. 1163-1179) and one of his own associates (Tr. 1180-1205), a species of trial tactics which might well try the patience of the most pa-

tient judge. The reading of the testimony at this point sufficiently negates the argument that the judge was trying unduly to speed up the proceeding, unless any limitation on endless repetitiousness and irrelevancies is deemed an improper or unjustified effort to keep a case within reasonable bounds.

In short, while petitioner succeeded in goading the trial judge into some sharp statements, the record clearly shows that whenever petitioner behaved, the judge acted in a judicial, proper and unbiased manner.

There is no evidence that the trial judge, in punishing petitioner, did so in an unthinking moment of personal pique, or for any other reason than in the interests of improving public respect for the courts by insisting on the maintenance of proper standards on the part of the bar. Early in the trial, when petitioner's discourtesies began to gain frequency, and long before there were signs of disturbance in the trial judge's judicial temper, the judge warned petitioner that if the conduct persisted he would send petitioner to jail at the end of the trial (R. 81, 88). Such warnings were repeated on several occasions during the trial (R. 142, 180). That petitioner, by failing to heed the judge's warnings to desist from his contemptuous conduct, finally succeeded in dislodging the trial judge's composure at times later in the trial does not show that, after the moment of pique had passed, the judge was incapable of acting fairly. On the contrary, the record conclusively estab-

lishes that the judge did not carry over his momentary annoyances.[19]

B. *The trial judge did not lose his power to punish petitioner summarily for contempt by deferring his action until the close of the trial, or because some of petitioner's misconduct was directed towards the judge as an individual.*

Even assuming, as the Court of Appeals states, that petitioner's "conduct cannot fairly be considered apart from that of the trial judge" each having "responded to great provocation from the other," still, there is no basis for disturbing the judgment below. For this Court's recent decision in *Sacher* v. *United States*, 343 U. S. 1, is dispositive of the issue thus presented. That case holds first that a district judge may, as here, postpone to the end of the trial the imposition of summary punishment on lawyers whose contempts have pervaded the trial, thus permitting an adjudication at a time when a far greater degree of calm and judg-

[19] The sentence of ten days' imprisonment imposed by the trial judge does not show bias in view of the flagrant character of petitioner's repeated contempts. The court below reduced it to 48 hours' imprisonment only because of the mitigating circumstances of the trial judge's provoked sharp admonitions. It is generally held that in contempt proceedings the courts should exercise only "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231; see *In re Michael*, 326 U.S. 224, 227; cf. *United States* v. *United Mine Workers of America*, 330 U.S. 258, 304. Provocation is a factor to be considered in determining adequate punishment. *Rothbard* v. *Brennan*, 263 App. Div. 991, 33 N.Y.S. 2d 361 (1942); *Pugh* v. *Winter*, 253 App. Div. 295, 2 N.Y.S. 2d 9 (1938); cf. *United States* v. *Markewich*, 261 Fed. 537 (S.D. N.Y.); *Deskins* v. *State*, 62 Okla. Crim. 314, 71 P. 2d 502 (1937).

ment can be expected than at the moment the contempt occurred. It also holds that the judge is not deprived of this power by reason of some of the contempts being directed at him personally. The language of the Court on this issue is explicit (343 U. S. at pp. 11-12):

> A construction of the Rule is advocated which would deny a judge power summarily to punish a contempt that is personal to himself except, perhaps, at a moment when it is necessary to forestall abortion of the trial. His only recourse, it is said, is to become an accuser or complaining witness in a proceeding before another judge.
>
> The Rule itself expresses no such limitation, and the contrary inference is almost inescapable. It is almost inevitable that any contempt of a court committed in the presence of a judge during a trial will be an offense against his dignity and authority. At a trial the court is so much the judge and the judge so much the court that the two terms are used interchangeably in countless opinions in this Court and generally in the literature of the law, and contempt of the one is contempt of the other. *It cannot be that summary punishment is only for such minor contempts as leave the judge indifferent and may be evaded by adding hectoring, abusive and defiant conduct toward the judge as an individual. Such an interpretation would nullify, in practice, the power it purports to grant.* [Emphasis added.]

Sacher, in short, squarely recognizes the principle which is decisive here: merely because the trial judge has become provoked by a lawyer's improper conduct, the former is not deprived of the power to hold the latter guilty of contempt. This is so at least in the absence of a showing that the contempt conviction was unreasonably or arbitrarily imposed by a judge who had wholly incapacitated himself from acting judicially, which is not true either of *Sacher* or the present case.

Since the record does not show any bias on the part of the trial judge which would disqualify him from enforcing the dignity of the court against petitioner's deliberately contumacious conduct, the judge's power to act at the close of the trial under Rule 42 (a), F. R. Crim. P., is clearly established. As this Court stated in *Sacher* (at p. 9), the practical reason for vesting the judges with power to punish summarily direct contempts is that "the formality, delay and digression that * * * result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial", frustrate the immediate purpose of the punishment for contempt in the face of court. And (at p. 8) "the very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary."

Indeed, to require such repeated contempts to be tried before another judge, with the original judge merely one of the witnesses as to what occurred, would not only tend to impair judicial dignity but, more importantly, would deprive a judge's orders of much of their effectiveness. For, obviously, his authority would be lessened if proof of disrespect for the court depended upon the taking of testimony of the judge, interested parties, and other persons in the courtroom, as to whether an attorney had shouted, sneered or emphasized some particular words in an insulting fashion.

Even so, it may be appropriate in an excess of caution so as to prevent some possible future injustice or abuse, to place some limits on the power of a federal judge to punish summarily for contempt in certain instances. Such a limitation might perhaps be warranted in cases where the toneless record fails to show any improper act on the part of counsel and sole "[r]eliance must be placed upon the fairness and objectivity of the presiding judge" (cf. *Fisher* v. *Pace*, 336 U. S. 155, 161), or where a grossly excessive or disproportionate sentence is imposed. However, clearly no such limitation is in any way justified or appropriate in the present case, where "[t]he record amply supports" (R. 266) a finding of repeated disorderly contempts, and, furthermore, fails to disclose any disqualifying incapacity on the part of the trial judge. Another factor which lends support to the decision of the court below is the

total absence here of any of the political pressures or the type of emotional atmosphere involved in *Sacher*.

The object of proceedings for criminal contempt is to assure orderly procedure in the courts and to prevent the administration of justice from falling into disrepute, and not to vindicate the personal feelings of any individual. See *Parker* v. *United States*, 153 F. 2d 66, 70 (C.A. 1); *Leitstein* v. *Capital Co.*, 96 F. 2d 23, 25 (C.A. 3);[20] see also Phillips and McCoy, *Conduct of Judges and Lawyers* (1952), at 86. In sentencing petitioner, the trial judge was merely carrying out his trust of vindicating the dignity and the authority of the court. *Ex parte Hudgings*, 249 U.S. 378; *Ex parte Terry*, 128 U.S. 289; cf. *Cooke* v. *United States*, 267 U.S. 517.

Punishment for contempt is disciplinary. "[I]ts great and only purpose is to secure judicial authority from obstruction in the performance of its duties * * *". *Ex parte Hudgings*, 249 U. S. 378, 383. The power to act summarily is founded upon the same pragmatic sanction—the preservation of the public order—which makes it necessary to

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[20] Years ago a distinguished English jurist stated that, except for a judge's duty to vindicate the dignity of the court, "there would be scarcely a case, I think, in which any Judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps". Blackburn, J., *Skipworth's Case*, (1873) L.R. 9 Q.B. Ca. 230, 232; see also *Ex parte Fernandez*, (1861) 10 C.B. (N.S.) 3.

grant summary powers to other persons who must enforce discipline, such as army commanders in the field, masters of ships at sea, and traffic policemen. Experience has shown that discipline cannot be effectively maintained unless the person with authority to maintain it has, and on occasion exercises, the authority to enforce it. Petitioner was here punished summarily in order to demonstrate that repeated disorderly conduct in the court room would not be tolerated. Cf. *Ex parte Tferry*, 128 U.S. 289.

Part of the popular dissatisfaction with the administration of justice stems from the too frequent instances when trial counsel forget that they are officers of the court, and engage in "the bullying of witnesses" and other sensational and improper conduct, coupled with the failure of trial courts to exercise any adequate restraint on the use of such tactics. See Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Report of the 29th Annual Meeting of the American Bar Association (1906), 395, 405-406. As Dean Pound states:

> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.

While courts must be especially careful not to curtail in any way the legitimate functions of trial counsel, they must be permitted to mete out prompt

and effective discipline in cases involving repeated obstructive and contemptuous tactics, of the kind here perpetrated by petitioner, which have done so much to bring the courts and the Bar of this country into disrepute. Cf. Phillips & McCoy, *Conduct of Judges and Lawyers* (1952), at 79-81, 86-87.

Instances of such deliberate, prolonged, flagrant insolence as are shown by this record are fortunately very rare, but rare as they may be, such conduct must be subject to quick and effective control if the effectiveness and dignity of court proceedings is to be maintained. Whether another judge, in the face of petitioner's conduct, might have shown greater or less patience is not the issue here. The fact remains that petitioner was guilty of gross misbehavior in the presence of the court, as "[t]he record amply supports" (R. 266), and that there is nothing in the conduct of the trial judge which shows that he was incapable of dealing with it fairly.

The Court of Appeals, in reducing petitioner's sentence from ten days of confinement to forty-eight hours, took into consideration every possible mitigating factor. This modified sentence constitutes a minimum penalty, considering the flagrant character of petitioner's repeated misconduct, and is clearly appropriate and proper.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SEPTEMBER 1954.

GOVERNMENT APPENDIX A

EXAMPLES TYPIFYING THE LATITUDE ALLOWED PETITIONER AND THE ABSENCE OF HOSTILITY TO HIM WHENEVER HE COMPLIED WITH CUSTOMARY STANDARDS.

(1) *May 29, 1952*

Mr. McLaughlin, the Government prosecutor, conducted the direct examination of Mrs. Ott, a principal Government witness, who was testifying as to the first abortion performed on her by the defendant Peckham. Mr. McLaughlin asked (Tr. 91-94):

> Q. And did you pass the foetus?
>
> A. Yes.
>
> Mr. OFFUT: I object to this witness talking about passing the foetus. I don't know whether she is qualified to know what a foetus is or not.
>
> Mr. MCLAUGHLIN: All right; I will ask her.
>
> The COURT: I am inclined to sustain the objection.
>
> Mr. MCLAUGHLIN: I will ask her now.
>
> Mr. OFFUT: If Your Honor please, I have not objected to the line of questioning——
>
> The COURT: I will sustain the objection.
>
> Mr. MCLAUGHLIN: Surely; I will ask her.
>
> Mr. OFFUT: May we approach the bench a moment?
>
> The COURT: No; there is nothing before the Court.

Mr. OFFUTT: There is something I want to ask Your Honor, so I won't have to interrupt.

The COURT: Very well, you may approach the bench.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I sustained the objection because I think only the doctor can tell whether that was a foetus, or something else.

Mr. OFFUTT: Yes, Your Honor. I haven't objected to any of this. May my objection run to her description about her condition, subject to—I take it he is going to connect it up later with medical testimony.

The COURT: She can describe what she saw and what was done to her and how she felt. [Cf. Tr. 1918]

Mr. OFFUTT: I have no objection to that.

Then there is one other thing—so that I won't have to object—I take it he is going to fix a date later on?

The COURT: Well, I don't know.

Mr. MCLAUGHLIN: I will set that.

Mr. OFFUTT: He did not fix the date; he said, early in May.

The COURT: That is sufficient.

Mr. MCLAUGHLIN: I will set that, Your Honor.

Mr. OFFUTT: I just wanted to make that point.

The COURT: The indictment charges on or about May second.

Mr. MCLAUGHLIN: I will set it specifically.

Mr. OFFUT: May I, so that I will protect my point, object to any evidence of an abortion, unless they prove that the child was viable?

There is a case in the Court of Appeals that the child must be viable; and if Your Honor wishes some points later, I shall be glad to present them.

The COURT: I will be glad to have that case; I do not recall it.

Mr. OFFUT: It is in 53 Appeals.

Mr. MCLAUGHLIN: Our statute is broad enough even to cover an attempt to perform it.

The COURT: That is right.

Mr. OFFUT: That is right; but they must charge it.

The COURT: I shall be very glad to have you submit a citation on that.

Is it your contention that, in order to come within this statute, there must have been a viable foetus?

Mr. OFFUT: Yes, Your Honor.

The COURT: I am inclined to the opposite view, but if you have any authority to sustain your view, please submit it.

Mr. OFFUT: All right, Your Honor. Thank you.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court:)

By Mr. McLAUGHLIN:

Q. Miss Ott, you used the term "foetus."

A. Yes, sir.

Q. What did you mean by that?

A. By the foetus, I mean the embryo child, the baby.

Q. And you referred to the foetus, or the child. Was the child formed?

A. Yes, sir. May I describe it?

Q. Yes.

Q. Well, George was with me at the time, and we could see, first, the tiny feet come out—

Mr. OFFUT: I object to what George saw, and move that it be stricken.

The COURT: Yes; limit yourself to what you saw.

When the trial recessed over the Memorial Day week-end, the following occurred (Tr. 123-124):

The COURT: Ladies and gentlemen of the jury, you will be excused at this time until Monday morning at 10:30. Please be back in your seats a few minutes before 10:30 on Monday morning.

Over the week-end please do not discuss the case with anyone and do not read any newspaper articles concerning it, if there should be any notices in the press.

Mr. OFFUT: May I ask one other thing?

The COURT: Yes, indeed.

Mr. OFFUT: May I ask if Your Honor would ask the jury that if anyone talks about this case, in their presence, and they overhear it, will they let the Court know about it?

The COURT: Yes.

Do not let anyone talk about this case to you. If anyone does, or if you overhear anyone discussing this case, please report the matter to the Court.

Mr. MCLAUGHLIN: I would suggest, also, for them to try to get the name of the person.

The COURT: Yes. If anyone tries to talk to you about this case, get that person's name and give it to the Court on Monday, or if you overhear anyone discussing the case will you report the matter.

Mr. OFFUT: May we approach the bench before you discharge the jury?

The COURT: Yes. The jury may be excused at this time until 10:30 Monday morning.

Mr. OFFUT: I said before you discharged the jury, Your Honor.

The COURT: Just a moment. Let the jury remain.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. OFFUT: Your Honor, I heard one of the men in the courtroom, I don't know who he

is, I could point him out, that when this jury was being impaneled—I just got this—that the lady who was on the stand just now was sitting in back and somebody who was on the jury asked her what the case was all about.

I would like to know, if Your Honor please, who that juror is. I don't know. That is the complaining witness on the stand now.

The COURT: How do you know the name of the juror?

Mr. OFFUTT: Only that this man says; he is a man that sticks around the court. Would Your Honor inquire?

The COURT: I would be glad to inquire Monday morning.

(2) *June 2, 1952*

Even when petitioner made no immediate objection, the trial judge of his own motion was careful to prevent the interjection by the prosecution of improper and prejudicial testimony (Tr. 150-151).

By Mr. MCLAUGHLIN:

Q. Do you recall anything else, Miss Ott, that was said at that time about your being a witness?

A. Yes; I do. He asked me if I was really the complainant, or did someone else start this case, and wasn't I being forced to testify, and didn't I know what would happen if I did—didn't I know what happened in the previous cases? Then he told me about a case——

The COURT: No; just a moment. Will counsel come to the bench?

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I think all reference to previous cases should be kept out.

Mr. MCLAUGHLIN: That is why I said to Your Honor previously, that she was going to say that in the previous case the girl was brought in on a stretcher.

The COURT: A case against this defendant?

Mr. MCLAUGHLIN: Yes.

The COURT: Then I don't want any reference made to a previous case.

(3) *June 2 and 3, 1952*

Petitioner was allowed an extremely thorough cross-examination of Mrs. Ott, which began during the morning session on June 2 and lasted until late in the afternoon of June 3. It covers over 200 pages in the transcript (Tr. 155-183, 185-217, 227-323, 334-367, 373-392). The following excerpts illustrate both the wide scope of the cross-examination allowed petitioner, and the favorable treatment given to reasonable requests made by petitioner:

By Mr. OFFUTT:

Q. Didn't you live there with a man, whether it was Jones, or anybody, now, and hold him out to be your husband, at 3009 Q

Street, Northwest, to Mr. and Mrs. Steerman?

A. I never actually lived there with a man; no.

Q. You never stayed overnight with any man, and held him out to be you husband, to Mr. and Mrs. Steerman; is that your answer?

Mr. McLaughlin: I think this is repetitious.

The Court: Yes; I think we have been over that, before.

Mr. Offutt: No; it is a different man—any man. I asked about Jones, specifically.

The Court: Very well; I will allow the question. Just answer Yes or No. (Tr. 166).

* * *

Afternoon Session

(Met, pursuant to the taking of the recess, at 1:45 o'clock p. m.)

The Court: Will counsel come to the bench.

(Thereupon counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The Court: You made a request, which I think was entirely reasonable, and that is that you have an opportunity to go to the Bar Outing; and in view of your request, I thought, if it was agreeable all around, we might recess

around two-thirty, or so. Is that agreeable to the Government?

Mr. McLAUGHLIN: I am not going to the outing, I know; I didn't anticipate it. But whatever Your Honor does is agreeable.

The COURT: I will recess around two-thirty. (Tr. 184.)

* * *

Q. Coming down for a moment, coming to this Sunday, yesterday, isn't this the conversation that took place yesterday, when you called me—the whole conversation——

Mr. McLAUGHLIN: I object to the phrasing of it. I think he ought to ask her questions. In other words, he is testifying in his question.

The COURT: This is cross-examination, and he is permitted to ask leading questions on cross-examination.

Mr. McLAUGHLIN: But he is testifying in his question,—"Didn't you say—" and then he reads a long question.

The COURT: He has the right to ask the question in that manner. (Tr. 193-194.)

* * *

Q. You are angry with the doctor, aren't you?

A. No sir; I am not angry with the doctor.

Q. Didn't you say you were, to me, on the telephone?

Mr. McLaughlin: I suggest that she has answered that.

The Court: No; this is proper cross-examination. (Tr. 208.)

* * *

Q. And didn't I say, in answer to that, this: —and you say the next thing.—

> "In my investigation I am going to tell the truth and bring out the truth at all times; it's about time that the truth be exposed in this case; it's about time you begin to tell the truth. Who is listening to this conversation? Mr. McLaughlin? Didn't he put you up to calling me?"

And you said, "No; he told me not to talk to you at all."

Mr. McLaughlin: Now, Your Honor, you see how he gets all that in. The answer is "no".

The Court: Mr. McLaughlin, she was examined on direct examination concerning her conversation with Mr. Offut, and I think that opens the door to cross-examination.

Mr. McLaughlin: Yes, I appreciate that, but he goes into this long dissertation, and he is in effect testifying.

The Court: He is in his legal rights.

By Mr. OFFUTT:

Q. (Continuing) Didn't that take place, that question, and answer by you?

A. I couldn't say exactly, it was such a long spiel, I can't remember exactly what you said.

Q. Do you deny that you said that, and I said that, at that time?

The COURT: She has answered your question.

By Mr. OFFUTT:

Q. And then didn't I say, "Then, why are you calling me back? Look, don't call me any more; stop bothering me, and just tell the truth on the stand. Where are you calling from?" And didn't you say, "A club on 14th Street." Didn't that take place?

A. May I say what you said in one long line, can I say what I said at the beginning of that?

I said, "I am not bothering you; I simply want to know why you did such-and-such"—you have forgotten that.

Q. You tell me what it was, if you say I have forgotten something that was in there.

Mr. MCLAUGHLIN: I object to that; we are getting no place.

The COURT: I will let her answer.

A. When you asked me, "Why are you bothering me?", I said, "I am not bothering you; I have been trying to get you all day, and

I want to know why you brought my mother here; why you have been questioning my landlady; why you have been questioning all my friends." (Tr. 210-212.)

* * *

Q. When you left the doctor's office, on Monday, May 7th, how did you get away from the doctor's office to wherever you went, by taxicab?

A. I probably did.

Q. What is your recollection about it?

The COURT: I do not think it makes any difference whether she took a cab or bus or the streetcar.

Mr. OFFUTT: It has some relevancy, Your Honor, I assure you.

The COURT: Very well.

Do you remember whether it was a cab or some other means of transportation?

The WITNESS: I don't remember. It was either a cab or the trolley, I don't remember which.

By Mr. OFFUTT:

Q. Where did you go that time, to 2415 Pennsylvania Avenue?

A. Yes, sir.

Q. In between that time, after you left the doctor's office, you never contacted the doctor any more until this January matter, is that correct?

A. That is correct.

Q. When Mr. McLaughlin asked you about your health, and I am having that in mind now, between that date isn't it a fact that you went to Mount Alto Hospital?

Mr. McLaughlin: I didn't ask her about her health at that time.

The Court: Mr. Offutt, I am going to exclude the question. You may reframe the question, if you wish, and do not preface it with any remarks.

Mr. Offutt: Oh, yes, sir.

By Mr. Offutt:

Q. Isn't it a fact that in October or November you went to Mount Alto Hospital and had an operation for a kidney disorder—1951?

Mr. McLaughlin: I object to this as being immaterial.

The Court: Objection overruled.

Mr. McLaughlin: The abortion wasn't until January.

The Court: I am going to overrule the objection. Just answer yes or no.

The Witness: Will you repeat it, please?

Mr. McLaughlin: I say, I don't think it is admissible, unless the defense was that the abortion was committed for the purpose of saving the life of this girl.

The Court: I do not know what the defense is going to be.

Mr. McLaughlin: I think we should know at this time in order to know whether the question is admissible.

The Court: I do not think the defense is under any legal obligation to disclose the defense. I am going to allow it. It seems immaterial to me, but there is a possibility it may be material, and therefore I shall allow it.

Mr. McLaughlin: That is, if the defense is that he committed it to save her life.

The Court: I do not know what the defense is.

Mr. McLaughlin: I say that is the only ground on which that would be admissible.

The Court: I am going to allow this question.

Mr. McLaughlin: All right, Your Honor.

Mr. Offutt: Read the question, please.

The Reporter (Reading):

"Isn't it a fact that in October or November you went to Mount Alto Hospital and had an operation for a kidney disorder—1951?"

The Court: You may answer the question. (Tr. 301-303.)

* * *

Mr. Offutt: May I approach the bench?

The Court: Yes. Indeed.

(Thereupon, counsel approached the bench and conferred with the Court, in a low tone of voice, as follows:)

Mr. OFFUTT: If Your Honor please, this trouble, whatever I am having, is flaring up on me; I am having a session of going to the bath, and that is the principal trouble I have had all night.

The COURT: We will take a recess whenever it is necessary.

Mr. OFFUTT: I was afraid—I was ready to go just before you came in.

The COURT: Well, we will take a recess if it becomes necessary.

Mr. OFFUTT: All right.

The COURT: You let the Clerk know and the Clerk will notify me. (Tr. 327.)

* * *

Mr. OFFUTT: The other thing is the subpoena which I served on the District Attorney to release these statements and things of the witness Ott, I have never had a report on that.

The COURT: Just a moment. I will direct this—I always do this, irrespective of any subpoena—I will let the defense counsel examine any statements made by the witness on the stand in order that he may confront her with any contradictory statements, if there are any.

Now as to statements of any other witnesses, I will not direct their production.

In other words, if you have a written statement made by the witness Ott, I think the defense counsel is entitled to see it.

Mr. MCLAUGHLIN: Of course, that is not the

law, but I appreciate—the law does say the Court has discretion.

The COURT: I think the law is that the Court has discretion.

Mr. MCLAUGHLIN: The final discretion under certain circumstances, yes.

The COURT: Yes. Suppose her story on the witness stand is different from her story in her statement, I think in the interest of justice counsel for defense should have a right to see that.

Mr. MCLAUGHLIN: I understand the law is that if he has any information that they are, he might refer to the statement for the purpose of contradicting her.

The COURT: But how could he get that information without getting the statement first?

Mr. MCLAUGHLIN: I don't know.

The COURT: I think it is in the interest of justice. Now, I will never direct a disclosure of any statement of any witness other than the witness on the witness stand.

I made that ruling in the Manfredonia case two weeks ago, where there was a request for the production of all statements of witnesses, and I denied that.

I said, however, whenever a witness takes the witness stand I will direct the production of that particular witness' statement in order that they may be used for the purpose of cross-examination, and Mr. Irelan, who personally argued the matter, acquiesced in that.

Mr. McLaughlin: Will Your Honor admit the statement in evidence?

The Court: I will not admit the statement in evidence, no. All I am going to do is this, to ask you to let Mr. Offutt read the statement, and he can use it for the purpose of cross-examining the witness. However, you may use it only for the purpose of confronting her with any part of that statement that may be contradictory of anything that she says on the witness stand, provided there is any contradiction.

Mr. McLaughlin: This is only in court, now; he can't take the statement out of court.

The Court: Oh, no.

Mr. Offutt: No, I don't want that.

The Court: You will have to read it in the courtroom.

Mr. Offutt: And this includes any statements she has made, doesn't it, Your Honor?

The Court: It includes all written statements that you may have, Mr. McLaughlin, made by this witness, in your possession or in your control. That means in your personal possession or in the possession of the Police Department, which are in your control.

You see the reason for not allowing a search of statements generally is that it may result in a miscarriage of justice because it may lead to concoction or fabrication of false testimony; but that argument does not apply when the

witness is on the witness stand, and only that particular witness' statement is being disclosed. (Tr. 329-331).

(4) *June 4 to 16, 1952*

Rulings similar to the above were made by Judge Holtzoff in favor of petitioner on numerous occasions throughout the trial (e.g. Tr. 722, 736, 862, 896, 903-904, 912, 1184, 1416, 1421, 1422-1423, 1435, 1506, 1508). Even after petitioner had succeeded in provoking the court into using sharp language in rebuking petitioner, the court continued to make rulings favorable to him whenever the occasion warranted. The following is an example when, on June 9, 1952, petitioner was examining William E. Jones, a witness called by him, who had admitted having been intimate with Mrs. Ott and having caused the pregnancy involved in the second abortion (Tr. 959-964):

By Mr. OFFUTT:

Q. Did you ever give anybody a statement in this case before you were called here as a witness?

Mr. MCLAUGHLIN: I object to this, Your Honor. I do not see the materiality.

The COURT: Objection overruled.

Mr. MCLAUGHLIN: It is his own witness, Your Honor.

The COURT: Have you any written statement from this witness, Mr. McLaughlin?

Mr. McLAUGHLIN: Yes, I have a statement from him, Your Honor.

The COURT: Well, I think that answers the question.

Mr. OFFUTT: I have a subpoena out. May I see that statement, Your Honor? I have a subpoena out for it.

Mr. McLAUGHLIN: What is he trying to do? I don't understand the purpose of it, Your Honor. This is his own witness.

The COURT: Beg pardon?

Mr. McLAUGHLIN: This is not a witness of mine. This is a witness of his.

The COURT: Yes, I understand, but I think under the circumstances I am going to rule that Mr. Offutt has the right to see the statement.

Mr. OFFUTT: Your Honor, while he is looking for the statement, I overlooked——

The COURT: You may look at the statement, if you wish.

Mr. OFFUTT: I say, while he is looking for it, I overlooked one thing, this record here, which was not offered here today.

The COURT: Very well.

Mr. OFFUTT: The record of the jail which shows the visits. I overlooked offering that the other day because Mr. Bernot was here, and I just noticed it is here, the record of the visits to the hospital.

The COURT: I suggest you finish with this

witness first so we will have a continuous record.

Mr. OFFUTT: All right, sir.

May I look at this just a moment?

The COURT: Yes.

Gentlemen, I suggest you come to the bench.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

The COURT: I made my ruling on the basis of the thought that this witness may be regarded as a hostile witness or a reluctant witness.

Under the rule of the Bedell case, if there is any contradiction between his oral testimony and the written statement, that written statement may be used to refresh his recollection, and only for that purpose.

Mr. MCLAUGHLIN: Yes, sir.

The COURT: You recall the Bedell case?

Mr. MCLAUGHLIN: Yes.

The COURT: You may go back to the counsel table. You may read the statement before you proceed, if you wish.

Mr. OFFUTT: I just want to ask something else.

The COURT: Mr. MCLAUGHLIN, come back.

Mr. MCLAUGHLIN: Yes, sir.

Mr. OFFUTT: In this statement, I will just use it under the limited thing, Your Honor, as to show any contradictions, that is all.

The COURT: Well, now, not quite that way.

Mr. OFFUTT: Is that right?

The COURT: He is your witness.

Mr. OFFUTT: Yes, I see.

The COURT: If there is any contradictory statement, you may use the statement for the purpose of trying to refresh the witness' recollection.

Mr. OFFUTT: Oh, yes.

The COURT: Now, if it does not refresh his recollection, then the statement itself is not admissible in evidence.

Mr. OFFUTT: That is what I meant, Your Honor.

The COURT: Yes.

Mr. OFFUTT: There is one other thing, so I will be clear in Your Honor's ruling. I don't want to call this next witness unless I understand Your Honor's position on it.

As I understood Your Honor and, if I am wrong, I wish Your Honor would clear me up on it, in connection with the telephone call that was made by me to Mary Lee Ott on this Sunday, May 25—that is the Sunday before he started the case, that is a week before he started—did Your Honor rule that if anyone listened in on the conversation, they would be permitted to testify?

The COURT: I have not ruled.

Mr. OFFUTT: Oh, that is what I would like to know.

The COURT: I have not made a ruling on that.

Mr. OFFUTT: Would Your Honor tell me your position on that?

The COURT: I don't know. I am not going to rule in advance of any witness being called.

Mr. OFFUTT: I thought Your Honor said, and if I misunderstood you—I must have misunderstood you.

The COURT: I did say that there may be a question as to whether this violates the Communications Act. I made no ruling on it. All I said was there may be a question.

Mr. OFFUTT: I thought Your Honor said it was a violation.

The COURT: I don't think so.

Mr. OFFUTT: I found it in the record, so then it must be an error.

The COURT: If the record says so——

Mr. OFFUTT: Yes, it does say it.

The Court: I did not make a binding ruling on that.

Mr. OFFUTT: Yes, sir.

The COURT: I don't make rulings in advance of testimony being offered in the proper form.

Mr. OFFUTT: Yes, sir.

The COURT: There are reasons for not doing that.

Mr. OFFUTT: Your Honor, in the Lewis case, United States v. Lewis, that numbers case—and I think the Belecci [sic] case, I understood Your Honor, in reading it, that Your Honor had taken the position that if the person having a conversation with another person, either

one of those two parties to the conversation gave permission to someone—that that was all *right*.

The COURT: I recall that.

Mr. OFFUTT: But, if the conversation was intercepted by wire tapping or something like that, that was a violation.

Is that Your Honor's position?

The COURT: I made that ruling and, of course, that is my view of the law.

Mr. OFFUTT: Yes, sir, that is what I was relying on, Your Honor.

The COURT: Yes, you may rely on that. I don't often change my mind. Sometimes I do.

Mr. OFFUTT: Thank you very much, Your Honor.

The COURT: Yes.

(Counsel returned to the trial table.)

The COURT: Mr. Offutt, I suggest that you defer reading the statement until the luncheon recess.

Mr. OFFUTT: All right.

The COURT: Now, if you are otherwise through with this witness, you can go on with another witness, and then, after reading the statement, if you want to call this witness I will permit you to do so.

Mr. OFFUTT: All right, I will do that, Your Honor.

Further examples of the trial judge's liberal manner of dealing with petitioner whenever he was

properly developing relevant testimony are shown by reading the entire direct examination permitted when petitioner was examining (a) defendant Peckham, who testified in his own defense (Tr. 1228-1364) and (b) Dr. Tully, who provided defendant with certain alibi testimony (Tr. 980-992).

Another good example of the handling of the trial on those occasions when petitioner was desisting from his highly provocative conduct and tactics, is shown by the transcript of the proceedings during petitioner's argument for a directed verdict on June 13, when the trial was nearly over (Tr. 1761-1777).

GOVERNMENT APPENDIX B

Further Details Respecting Petitioner's Contempt

A number of examples of petitioner's improper and provoking conduct have been set forth in the Government's brief at pages 12-24, *supra*. Some additional examples are set forth below.

(1) *June 5, 1952*

The following incident took place early on June 5 (Tr. 591-592; see R. 130-131):

By Mr. Offutt:

Q. By the way, Doctor, do you recognize Mr. Spriggs here sitting in the front row?

A. Yes.

The COURT: Go ahead.

Mr. OFFUTT: Oh. Your Honor, when you move like that it startles me and disturbs me——

Mr. MCLAUGHLIN: Oh, I object to this.

Mr. OFFUTT (continuing):—I know you don't intend to do it.

The COURT: You mean that when I shift in my chair that disturbs you?

Mr. OFFUTT: When you jump from the seat up to the desk, it does, because most of the time you reprimand me or stop me, and I am very much upset and nervous about this.

The COURT: Don't be absurd, Mr. Offutt.

Mr. OFFUTT: I am not absurd, Your Honor, I assure you.

The COURT: Don't be absurd.

Mr. OFFUTT: I am not absurd, Your Honor, that is my feeling.

The COURT: Unless you proceed with this cross examination I shall excuse the witness.

Mr. OFFUTT: If you will just be patient with me, Your Honor.

The COURT: No; you tax my patience.

Mr. OFFUTT: Why, Your Honor? Will you please tell me?

Mr. MCLAUGHLIN: I object to this, Your Honor.

Mr. OFFUTT: I am trying to do my best.

The COURT: Unless the next utterance that comes from your lips is a question addressed to this witness I will excuse this witness.

(2) *June 6, 1952*

When Mrs. Hodges, the mother of Mary Ott, had been called as a witness, on June 4, petitioner objected to Mrs. Ott's presence in the court room. The Court explained that witnesses were excluded only before they testified (R. 77; Tr. 416-417). During the cross-examination of Mrs. Hodges, petitioner again made a point of Mrs. Ott's presence in the court room (R. 88; Tr. 431-432). On the afternoon of June 5, the prosecuting attorney notified the court that petitioner had served a subpoena on Mrs. Ott, and the court ruled that petitioner was within his rights (R. 147; Tr. 673). Petitioner then asked that the witness be excluded from the court room, but the court ruled that it excluded only those witnesses known to be such at the beginning of the trial and explained that the matter was not one of law but of local practice in the discretion of the court (Tr. 673-675).

On June 6, petitioner again objected to Mrs. Ott's presence in the court room (R. 161; Tr. 790). The following occurred (R. 161-162; Tr. 791):

> The COURT: After her testimony is concluded, she can sit any place she likes. Any witness who has testified may remain in the courtroom as a spectator, and the mere fact the witness may be called for rebuttal is no reason for the Court not permitting the witness to remain. We were over that yesterday, Mr. Offutt. Please don't repeat it.
>
> Mr. OFFUTT: I object to the long speeches

about it, your Honor; I just made an objection and I asked your Honor to rule on it, that's all.

The COURT: You object to what?

Mr. OFFUTT: I object to——

The COURT: You object to what?

Mr. OFFUTT: I object to the long dissertation about it. I made no argument; your Honor has not permitted me to make any argument, and I merely object to Mr. McLaughlin——

The COURT: I think you are getting very discourteous to the Court.

(3) *June 10, 1952*

The following is the complete transcript of the episode referred to in the Government's brief at pages 23-24, *supra*. Petitioner had requested and had been granted permission to come to the bench for a conference with the judge, when the following occurred (Tr. 1078-1083; see R. 213-215):

Mr. OFFUTT: If Your Honor please, I want to ask this witness about some things in his statement, which I have just learned by seeing it, that were not covered in the direct examination, except to this extent, when he referred to the fact that, as I recall it, that he had known her for several years.

The COURT: I shall not make any ruling unless the question is before me.

Just specifically what question do you want to ask, and if you will tell me that I shall in-

dicate whether I shall permit the question to be asked.

Mr. OFFUTT: I want to ask him if it is a fact that he went around with this lady, Mrs. Mary Lee Ott, when he was out at the Bethesda Hospital, in 1950, in March and April, and at least once or twice a week while she was living with the man in her common law marriage, named Christ, who is Mr. Christenson, and that——

The COURT: I shall exclude that.

Mr. MCLAUGHLIN: I object to that, Your Honor.

The COURT: Just a moment.

Mr. OFFUTT: I thought you were going to let me finish.

The COURT: I thought you had finished that one question.

Mr. OFFUTT: I was going to include these other things in the same question.

Mr. MCLAUGHLIN: I think he ought to ask all the questions down there.

The COURT: I am going to exclude that question as obviously irrelevant, and I also wish to add, for the purpose of the record, that is nothing but an attempt to smear and throw mud at the witnesses in this case, without any justification, and in an irrelevant matter.

Of course, if an issue is relevant, and results in mud being thrown, that is permissible, but to throw mud at a person on an absolutely ir-

relevant matter, merely because he is a witness, is not permissible.

Mr. Offutt: I respectfully urge that the credibility of the witness Ott is very much in issue.

The Court: In the first place, he is your witness, and in the second place, even if he were an adverse witness, the cross-examination as to credibility may not extend that far.

Mr. Offutt: I am not cross-examining him. This is my witness, Your Honor.

The Court: Then certainly you may not examine him.

Mr. Offutt: Not his credibility, but the credibility of the witness Ott. Your Honor didn't hear me; that's what I have been urging all the time in this case, and you have been talking about the witness.

The Court: You should know enough law to know that you can examine a witness as to that witness' credibility, but you may not examine, for example, Witness A for the purpose of affecting the credibility of Witness B. You can only cross-examine B as to his own credibility.

Mr. Offutt: I urge that is not the statement of the law; that I can examine Witness A to show that the credibility of Witness B——

The Court: I have made my ruling. If I am wrong then you have a remedy in the Court of Appeals.

Mr. OFFUTT: May I make the proffer at this time?

The COURT: No, you may not.

Mr. OFFUTT: So that the record will be complete in the Court of Appeals, if we need to go there——

The COURT: No, I have already made my ruling.

I was just reading an opinion of Justice Jackson. He says that it is not permissible for a lawyer to continue arguing after the Court has ruled.

Mr. OFFUTT: That is the reason I objected to Mr. McLaughlin several times, Your Honor.

The COURT: Now, you take care of your own conduct and Mr. McLaughlin will take care of his. I think if your conduct were as good as Mr. McLaughlin's I would give you a medal.

Mr. OFFUTT: I object to it because when I have objected to it, I have to object to it, and I am able to show you many places in the record where Mr. McLaughlin has continued talking and I have objected to it.

The COURT: The next time when I make a ruling I don't want any response from you.

Mr. OFFUTT: I beg your pardon.

Mr. MCLAUGHLIN: Let's have the questions asked from down at the counsel table.

The COURT: You may go back to counsel table and proceed with the examination of the witness.

Mr. OFFUTT: May I have an objection?

The COURT: Go back to the counsel table.

Mr. MCLAUGHLIN: May I say that the defense attorney——

The COURT: Go back to counsel table.

Mr. OFFUTT: I object to your putting your hand up like that——

The COURT: Go back to counsel table. Stop, or I will have the Marshal pull you back to your seat.

Mr. MCLAUGHLIN: May I say for the record that this attorney has abused Your Honor's privilege of asking to come to the bench.

(Whereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:)

Mr. OFFUTT: If the Court please, I respectfully move Your Honor for a mistrial and——

The COURT: Motion denied.

Mr. OFFUTT (Continuing):—and I want to put the proffer on the record at this time——

The COURT: Motion denied.

Mr. OFFUTT: And I want the record to show that Your Honor raised your hand——

The COURT: Motion denied.

Mr. OFFUTT: (Continuing):—and ordered me back from the bench.

The COURT: Motion denied. Proceed.

Mr. OFFUTT: I object to Your Honor yelling at me and raising your voice like that.

The COURT: Just a moment. If you say

another word I will have the Marshal stick a gag in your mouth.

You proceed with the examination of the witness. Proceed.

Mr. OFFUTT: If Your Honor please, I can't continue like this——

The COURT: I direct you to continue.

Mr. OFFUTT: (Continuing)—with Your Honor yelling at me and Your Honor threatening me with punishment for contempt for objecting, as I have a right to do, in accordance with the Lewis case.

The COURT: You may proceed.

Mr. OFFUTT: I insist on being permitted to object and make my motions when Your Honor's conduct justifies it.

The COURT: You have made your motion and I have ruled, and you will desist from speaking after I have ruled on your motion.

Mr. OFFUTT: But then you did something——

The COURT: Proceed with the examination of this witness.

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